

CLINTON GORE '96

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COUNSEL

August 6, 1996

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Lawrence M. Noble, Esquire
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: MUR 4407, Clinton/Gore '96 Primary Committee, Inc.
and Joan Pollitt, as Treasurer

Dear Mr. Noble:

As the designated counsel for the Clinton/Gore '96 Primary Committee, Inc. (the "Committee") and Joan Pollitt, as Treasurer, we are submitting this letter for consideration by the Commission in connection with the above-captioned MUR. This submission was invited by staff attorney Peter Blumberg in a telephone call informing us that the Commission would be considering a request made by complainant seeking the denial of additional matching fund payments to the Committee.

We note for the record that the Committee sought and was granted an extension of time until August 19, 1996 to respond to the complaint. The Committee will address the substantive issues contained in the complaint at that time.

The complaint filed by the Dole for President Committee requests that the Commission "[s]uspend any further payments of matching funds to the Campaign". For the reasons stated below, the Committee respectfully urges the Commission deny complainant's request.

The Presidential Primary Matching Payment Account Act, 26 U.S.C. § 9031 *et seq.* (the "Act") contains specific requirements for candidate eligibility for matching funds. Pursuant to 26 U.S.C. § 9033, in order to establish eligibility, a candidate must agree to certain conditions in writing and must certify adherence to certain requirements¹. Once a candidate establishes

¹26 U.S.C. § 9033 provides -- (a) To be eligible to receive payments under section 9037, a candidate shall, in writing--

- 1) agree to obtain and furnish to the Commission any evidence it may request of qualified campaign expenses,
 - 2) agree to keep and furnish to the Commission any records, books, and other information it may request, and
 - 3) agree to an audit and examination by the Commission under section 9038 and to pay any amounts required to be paid under such section.
- (b) To be eligible to receive payments under section 9037, a candidate shall certify to the Commission that--
- 1) the candidate and his authorized committees will not incur qualified campaign expenses in excess of the

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eligibility under the Act to receive matching funds, the Act directs the Commission to certify the candidate for matching funds².

Once certified, a candidate may receive matching funds through his or her date of ineligibility, absent a determination by the Commission to suspend such payments. Because the Act and Commission regulations are silent with respect to the standard to be applied in making a determination to suspend matching fund payments, and because of First Amendment constraints on government action, the courts have established a standard to be applied by the Commission in assessing a candidate's entitlement to matching funds.

Clearly, as an initial matter, the Commission is not permitted simply to distrust the candidate agreements and commitments made pursuant to 26 U.S.C § 9033. Rather, the evidence before the Commission must contain "patent irregularities suggesting the possibility of fraud." Committee to Elect Lyndon LaRouche v. FEC, 613 F.2d 834, 842 (D.C. Cir 1979), cert. denied, 444 U.S. 104 (1980).

In a more recent case, the U.S. Court of Appeals for the D.C. Circuit refined the above test and held that the Commission is limited to using only objective criteria [set forth in the statute itself] when assessing a candidate's eligibility for matching fund payments. LaRouche v. FEC, 966 F.2d 1263 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 550 (1993). Any inquiry into the "bona fides" of a candidate's promises to abide by federal campaign finance law, and §9033 in particular, would allow the Commission to engage in "highly subjective inquiries" that would imperil the assurance of applying the eligibility criteria for matching funds in an even-handed manner. Id. at 1267.

In this matter, the Commission determined that President Clinton satisfied the eligibility requirements of 26 U.S.C. § 9033 on October 31, 1995. To date, the Committee has made routine monthly submissions for matching funds and received payments totaling \$13,412,197.51.

In connection with the complaint in this matter, the Commission has not been presented with any credible evidence whatsoever, let alone evidence of patent irregularities suggesting the possibility of fraud. None of the allegations in the complaint allege patent irregularities; none of

limitations on such expenses under section 9035,

2) the candidate is seeking nomination by a political party for election to the office of President of the United States,

3) the candidate has received matching contributions which in the aggregate, exceed \$5,000 in contributions from residents of each of at least 20 States, and

4) the aggregate of contributions certified with respect to any person under paragraph (3) does not exceed \$250.

²The Act's provisions preclude withholding funding from a candidate after the objective criteria for eligibility are met, because of important constitutional free speech considerations inherent in public financing. In re Carter-Mondale Reelection Committee, Inc., 642 F. 2d 538,544 (D.C. Cir. 1980).

the allegations suggest the possibility of fraud.

Moreover, even though the complaint is deficient in its allegations, no evidence has been presented by the complainant which would come close to satisfying the objective standard set forth above. The sole attachment to the complaint is an excerpt from a book which is completely lacking in evidentiary value and is devoid of any hint of patent irregularities or of any suggestion of fraud³. Nothing in the complaint could possibly lead the Commission to conclude that the Committee's matching fund submissions contained patent irregularities suggesting the possibility of fraud. Similarly, nothing in the President's candidate agreement or routine monthly submissions could lead the Commission to conclude that there are patent irregularities suggesting the possibility of fraud.

Only when presented with sufficient evidence to meet the objective standard is the Commission entitled to take action contrary to its earlier certification of the candidate. The candidate agreement submitted and commitments made by President Clinton are the only objective criteria presented to the Commission at this time. In light of that record and in the absence of any evidence to the contrary, the Commission is precluded from making a determination to suspend the Committee's matching fund payments⁴. Accordingly, the Committee respectfully urges the Commission deny complainant's request to suspend the Committee's matching fund payments.

Respectfully submitted,


Lyn Utrecht
General Counsel


Eric Kleinfeld
Chief Counsel

³The Committee will more fully discuss the evidentiary deficiencies of the complaint in its subsequently filed response.

⁴ Complainant has also requested that the Committee should be "required to place in escrow its remaining matching funds for future penalties and repayments." Absolutely nothing in the Act or Commission regulations authorizes the Commission to order such an action, and therefore, the Committee is not addressing this request herein. However, a subsequent repayment requirement and not a transfer to escrow is the only remedy available to the Commission.